(3)

IN THE HIGH COURT OF CHATTISGARH AT BILASPUR

APPEAL

CRIMINAL ~~REVISION~~ NO.:- 219 /2001

PETITIONER/ APPELLANT :-

(IN JAIL)

SHYAM@ Shyam lal @ Bunti
S/o Dula Ram, Age - 20 yrs.
R/o Bodapara, Nayamunda
Jagdalpur Distt. Bilaspur (C.G.)

Bastar 3.1.02 3.1.02

4880 Filed on 15-12-01 Shri Surykant Mishra Advocate R. to BR(J)

VERSUS

RESPONDENT

State at Chhattisgarh
through P.S. Bodhghat
(Baster)

CRIMINAL APPEAL U/S 374(2) Code of Criminal Procedure.

CONVICTION	**Sentences**
U/S 376 (2)(g) I.P.C.	**10 Yrs. R.I. along with Rs. 500 in default 1 Month R.I.** 3.1.02

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri **DILIP RAOSAHEB DESHMUKH, J.**

Criminal Appeal No. 1222/2001

Prakash

Vs.

State of Chhattisgarh

Criminal Appeal No.1219/2001

Shyamal @ Shyamlal @ Bunti

Vs.

State of Chhattisgarh

PRESENT: -

Shri R.N.Jha, learned counsel for the accused-appellant **Prakash.**
Shri Surya Kant Mishra, learned counsel for the accused-appellant **Shyamal @ Shyamlal @ Bunti.**
Shri Ashish Shukla, G.A./Addl. Public Prosecutor for the State.

ORAL JUDGMENT
(Delivered on 05-05-2006)

Both the abovementioned appeals are directed against the judgment dated 30-10-2001 delivered by Shri A. R. Dhruw, Ist Additional Sessions Judge, Jagdalpur District-Bastar in Sessions Case Number-347/2001 whereby the appellants Shyamal @ Bunti and Prakash were convicted for the offence under Section-376 (2)(G) of the IPC and were sentenced to rigorous imprisonment for 10 years each and to a fine of Rs.500/- and in default of payment of fine to undergo additional rigorous imprisonment for 6 months.

2. Briefly stated the prosecution story is that on 11-07-2001 at 07.30 P.M., the prosecutrix, an old lady aged 60 years was cooking food. She heard a knock at the door and on her asking the person

knocking at the door said "Mother, I am Bunti, open the door". The prosecutrix opened the door and found that the appellants Bunti and Prakash were at the door. Bunti entered the house while Prakash stood outside. Bunti closed the door, opened a knife and started grappling with the prosecutrix. She resisted saying that she was an old lady. In reply the appellant Bunti said that "Today I would not leave you" and pushed the prosecutrix on the ground and raising her saree and lahanga committed rape on her. After commission of rape, the appellant Bunti opened the door and went outside. Thereafter, the appellant Prakash entered into the house and saying that he would also commit sexual intercourse with her ~~and~~ started grappling with the prosecutrix who somehow managed to escape from the backdoor. The prosecutrix immediately informed about the occurrence to Mangaldae PW-1 and also to M.S.Chand, father at the church. Report of the incident was lodged by the prosecutrix on 12-07-2001 at 12.30 P.M. vide Ex.P-9. On being medically examined Dr. Smt. S.Das PW-2 did not find any marks of violence on her person or private parts. Hymen was absent. She opined that since the prosecutrix was habitual of sexual intercourse, no definite opinion about rape could be given. Vaginal slides were prepared and handed over to the Constable in a sealed packet. One underwear was seized from the appellant Bunti vide Ex.P-6. Petticoat worn by the prosecutrix at the time of occurrence was seized vide Ex.P-5. Vaginal Slides, Underwear of the appellant Bunti and the petticoat of the prosecutrix were sent to the Forensic Science Laboratory, Raipur vide memo Ex.P-18 dated 17-07-2001 and were received at the Forensic Science Laboratory, Raipur on 18-07-2001. The prosecution did not produce the report of the Forensic Science Laboratory

before the trial Judge. Dr. Vijay Thakur PW-5 examined the appellant Bunti and found nothing to suggest that he was not capable of performing sexual intercourse. After completion of investigation, the appellants were prosecuted and charged under Section-376 (2)(G) of IPC. The appellants abjured the guilt. The prosecution examined 8 witnesses. Relying upon the sole testimony of the prosecutrix PW-7 which was dully corroborated by the F.I.R. Ex.P-9, the learned trial Judge convicted and sentenced the appellants as aforesaid. (Supra)

3. Shri R.N.Jha, learned counsel for the appellant Prakash has argued that the testimony of the prosecutrix in para-4 is indicative of the fact that she had gone with Bhola Ram PW-6 for lodging report at the Police Station immediately after the occurrence on the same day whereas Ex.P-9 appears to have been lodged on the next day at 12.30 P.M. Thus, there is no reasonable explanation for the delay in lodging the F.I.R. It was also argued that the testimony of the prosecutrix did not show that the appellant Prakash was acting in concert with the appellant Bunti and, therefore, conviction of the appellant Prakash under Section-376(2)(G) of IPC was liable to be set aside. Reliance was placed on ***Ashok Kumar Vs. State of Haryana*** reported in **(2003) 2 Supreme Court Cases 143**.

4. Shri Surya Kant Mishra, learned counsel for the appellant Shyamal @ Bunti argued that failure of the Investigating Officer to seize the knife alleged to have been used by the appellant Bunti during the occurrence rendered the testimony of the prosecutrix unreliable. He also echoed the arguments of Shri R.N.Jha, learned

counsel for the appellant Prakash that there was no satisfactory explanation for the delay in lodging the F.I.R. It was also pointed out that failure of the prosecution to produce the report of Forensic Science Laboratory rendered the testimony of the prosecutrix unreliable. Mangaldae PW-1 to whom the prosecutrix had narrated the incident immediately, also did not support the prosecution story. It was also argued that Bhola Ram PW-6, son of the prosecutrix, in his examination in chief as also in his cross-examination, did not support the prosecution story.

5. On the above premises, both the learned counsel argued that the conviction and sentence awarded by the learned trial Judge was liable to be set aside and both the appellants deserved acquittal. Lastly, both the learned counsel contended that the appellants were youthful offenders and had already undergone imprisonment since 14-07-2001 i.e. for a period over 4 years & 9 months. Since the appellants were first offenders, the sentence awarded by the learned trial Judge should be reduced to sentence already undergone by the appellants.

6. On the other hand, Shri Ashish Shukla, learned Govt. Advocate argued that the testimony of the prosecutrix being wholly unrebutted in cross examination was worthy of credence and no corroboration was necessary for convicting the appellants under Section-376(2)(G) of IPC. So far as the appellant Prakash is concerned, it was argued that the unrebutted testimony of the prosecutrix revealed that while both Bunti and Prakash came to the house of the prosecutrix together, the appellant Prakash stood at

the door while appellant Bunti committed rape on the prosecutrix and after commission of rape by Bunti, the appellant Prakash entered into the house, but in the meanwhile the prosecutrix escaped from the backdoor. Learned Govt. Advocate argued that the wholly unrebutted testimony of the prosecutrix clearly shows that the appellant Prakash was also acting in concert with the appellant Bunti and therefore conviction of the appellants under Section-376(2)(G) of IPC and the sentence awarded thereunder are well founded.

7. Having considered rival submissions, I have perused the record of Sessions Case No.347/2001. It is now well settled by a catena of decisions of the Apex Court that where the testimony of the prosecutrix is reliable, worthy of credence and inspires confidence, no further corroboration is necessary and conviction on the basis of the sole testimony of the prosecutrix is permissible. True, that Mangaldae PW-1, to whom the prosecutrix is alleged to have informed the incident immediately after the occurrence, did not support the prosecution story and M.S. Chand, father at the Church was also not examined by the prosecution, but the only question which requires consideration in both appeals is whether the testimony of the prosecutrix is reliable and worth credence or not.

8. The prosecutrix, an old lady aged 60 years, has stated in her testimony that in the evening while she was all alone at the house and cooking food, she heard knocks at the door. On her asking, the person knocking at the door said he was Bunti. She opened the door and found that both the appellants Bunti and Prakash stood at the door. Bunti entered the house while Prakash stood at the door.

Thereafter, Bunti pushed her on the ground and outraged her modesty by leaving her saree and petticoat. Bunti was holding a knife in his hand. After committing rape on her, Bunti went outside. Thereafter, the appellant Prakash entered the house, but she managed to escape from the backdoor.

9. It is true that in para-4 of her testimony, the prosecutrix stated that she went to the shop where her son was working and took her to the Police Station for lodging the report, but, she did not specifically mention that on the same day immediately after the occurrence she had gone to the shop where her son was working. The report Ex.P-9 lodged by the prosecutrix on 12-07-2001 at 12.30 P.M. was proved by Sub Inspector S.R.Netam PW-8 which fully corroborates the aforesaid testimony of the prosecutrix. No question has been put to the prosecutrix in cross examination to rebut her testimony. Not a single question has been put to rebut the testimony of the prosecutrix regarding commission of rape by the appellant Bunti and the fact that appellant Prakash stood at the door while the appellant Bunti committed rape and after Bunti went outside, the appellant Prakash came inside the house but the prosecutrix escaped from the backdoor. Nothing has been elicited in the cross examination to show that the prosecutrix bears any grudge against the appellants or has any motive to falsely implicate the appellants. In the cross examination of Bhola Ram PW-6, Mangaldae PW-1 also nothing has emerged to show that the prosecutrix had any animosity with the appellants.

10. So far as the arguments relating to delay in lodging the F.I.R. is concerned, it is required to be stated only to be rejected. F.I.R. was lodged on the very next day i.e. 12-07-2001 at 12.30 P.M. In a tradition bond conservative society, it cannot be expected that an old lady aged about 60 years who was ravished by a person of the age of her son would immediately rush to the Police Station to lodge F.I.R. after the occurrence. The feeling of shame and the fear of her prestige being lowered in the society cannot be lost sight of.

11. I shall now consider the argument relating to part played by appellant Prakash. The Explanation-1 to sub Section-2 of Section-376 of IPC clearly shows that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. In case of **Ashok Kumar Vs. State of Haryana** cited by the learned counsel for the appellant Prakash, the Apex Court held that in order to convict a person who had not actually raped the victim, for the offence under Section-376(2)(G) of IPC read with explanation-1 thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that the victim had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. The said provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from

the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds.

12. Applying the touchstone laid down by the Apex Court to the facts of the present case, the testimony of the prosecutrix clearly shows that upon hearing the knocks at the door when she opened the door of her house, she found that appellant Prakash and Bunti were standing outside the door. She stated that appellant Bunti first entered the house while appellant Prakash stood at the door. After commission of rape by the appellant Bunti, she stated that while Prakash was also entering the house, she escaped from the backdoor. This testimony is completely unquestioned in cross examination and clearly goes to show that appellant Prakash was acting in concert with the appellant Bunti and if the prosecutrix seeing him enter the house had not escaped from the backdoor, he too would have committed rape on the prosecutrix. Thus, the wholly unrebutted testimony of the prosecutrix clearly establishes that the appellant Prakash was acting in concert with the appellant Bunti and also intended to commit rape on the prosecutrix after Bunti finished the sexual act. In this view of the matter, the testimony of the prosecutrix establishes beyond doubt the guilt of the appellants under Section-376(2)(G) of the IPC.

13. So far as the sentence awarded by the learned trial Judge is concerned, in my considered opinion, the fact that the rape was committed on an old lady aged 60 years, who was of the age of the mother of the appellants, no leniency is required to be shown to the

appellants with regard to the sentence awarded by the learned trial Judge. To show mercy in such a heinous crime would be a travesty of justice. Plea of leniency is thus wholly misplaced.

13. In the result, both the appeals i.e. Criminal Appeal No.1222/2001 & Criminal Appeal No.1219/2001 being devoid of merit are dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Tumane